Technology and Dispute Resolution: Best Use Practices to Avoid Costly Litigation

Recent Developments in Electronic Discovery

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I. INTRODUCTION

Dispute resolution is an unavoidable part of the construction industry. Regardless of the success of a company's risk avoidance procedures, disputes arise that must be addressed by litigation or an alternative means of dispute resolution, such as arbitration, mediation or settlement conference. Electronic document management is an important component of any dispute resolution. On a fundamental level, effective preparation requires the ability to recover and analyze the relevant documentation. The majority of information today is stored in electronic form. Therefore, it is imperative that procedures be implemented to manage and organize electronic data for future reference.

Litigation exemplifies the need for electronic data organization. The rules for litigation require parties to exchange relevant information regarding the dispute, including electronic data. A company in litigation is generally required to retrieve and produce relevant electronic files to its opponent. Failure to do so voluntarily can result in a court order compelling compliance or, in some circumstances, sanctions by the court for non-compliance. Thus, the need to comply with litigation discovery requests and the need to prepare one's own case make the organization of electronic data a necessity.

The means of properly organizing, retaining and recovering electronic documents is readily available. As discussed herein, there are a number of computer applications available to assist in this effort. The handling of "deleted" electronic files is a particularly important as technology exists that recovers "deleted" files, rendering these files discoverable. Email recovery, in particular, has become a primary focus of discovery and it is safe to say that the internal handling of email is one of the most important document management issues for a company to address.

It is equally important to establish procedures for the creation of electronic files by employees. It is an unfortunate fact that people make statements in email that they would never put in "writing." The expectation of confidentiality that an author may have when drafting the email is simply not reflected in the technology. All too frequently confidential emails are forwarded indiscriminately. A single email message may be forwarded to numerous recipients thereby damaging or destroying any confidentiality that may have otherwise vested. Such proliferation of email also has the unintended effect of creating numerous locations where it can reside as stored or deleted data – sometimes for many years.

II. LITIGATION AND THE DISCOVERY OF ELECTRONIC FILES

The developing case law on the discovery of electronic documents and the shifting obligation for the cost of producing those documents in discovery (discussed in Section III below) make it clear that an effective electronic data retention program can save money and reduce risk. As discussed below, courts seek to balance the benefits of obtaining the discovery with the costs of obtaining it.

A. What Electronic Information is Discoverable

Most court's rules of civil procedure create a very low threshold to initiate a claim and rely heavily on the discovery process to determine the actual claim substance.[1] Thus, broad discovery is the cornerstone of litigation and the discovery of computer data, e-mails, palm pilots, cell phones - everything

and anything that stores data – is permissible in litigation. Rule 34(a) of the Federal Rules of Civil Procedures clearly authorizes a party to request production of computerized data:

> Any party may serve on any other party a request (1) to produce . . . any designated documents (including writings, . . . and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form) . . .

Rule 34 has been routinely applied by the courts to computer technology:

> The inclusive description of "documents" is revised to accord with changing technology. It makes clear that Rule 34 applies to electronic data compilations from which information can be obtained only with the use of detection devices, and that when the data can as a practical matter be made usable by the discovering party only through respondent's devices, respondent may be required to use his devices to translate the data into usable form. In many instances, this means that respondent will have to supply a printout of computer data. The burden thus placed on respondent will vary from case to case, and the courts have ample power under Rule 26(c) to protect respondent against undue burden or expense, either by restricting discovery or requiring that the discovering party pay the cost. [2]

Computer-stored information is discoverable under the same rules that pertain to tangible, written materials. [3]

B. Electronic Data Must be Produced in Addition to Hard Copies

The law is clear that data in electronic form is discoverable even if paper "hard copies" of the information have been produced. The difficulty in analyzing computer data in hard copy has been used to justify electronic discovery production for it "secure[s] the just, speedy, and *inexpensive* determination of every action."[4] The producing party may even be required to prepare a computer program to extract the data from its computerized business records, subject to the court's discretion as to the allocation of the cost of preparing such a computer program. [5] Of course, such extraordinary efforts are expensive, and when ordered, discovery retrieval cost-shifting is likely to be implemented.[6]

C. When Your Computer is Subject to Search

Under certain circumstances, a court may allow a party access to the opposing party's computer system.[7] In *Playboy Enterprises, Inc. v. Welles*, the plaintiff sought to have responsive e-mails recovered and produced when it learned that the defendant, despite the ongoing litigation, was continuing to delete electronic mail pursuant to its business practice.[8] Finding that the defendant's use of e-mail made it likely that relevant information was stored on the hard drive of the defendant's personal computer, the court granted plaintiff's request to examine the defendant's hard drive. The court noted that the plaintiff required access to the hard drive of defendant's computer only because its actions in deleting the e-mails made it impossible to produce the emails as a document.[9] The primary limitations on this right of access are the producing party's claims of undue burden and expense and/or invasion of privileged matter.[10] In considering whether a request for discovery will be "unduly burdensome", the court balances the benefit and burden of the discovery. [11] This balance takes into consideration "the needs of the case, the amount in controversy, the importance of the issues at stake, the potential for finding relevant material and the

importance of the proposed discovery in resolving the issues."[12] Under the circumstances of the *Playboy* case, the court found that the e-mails might reveal information critical to the claims of the plaintiff and decided that discovery of the defendant's hard drive was appropriate.

In order to protect against any improper disclosure, the court fashioned the following protocol for the recovery of e-mails:

> 1. The court will appoint a computer expert who specializes in the field of electronic discovery to create a "mirror image" of defendant's hard drive.
>
> 2. The court appointed computer specialist will serve as an officer of the court. To the extent the computer specialist has direct or indirect access to information protected by the attorney-client privilege, such "disclosure" will not result in a waiver of the attorney-client privilege. . . The computer specialist will sign the protective order currently in effect for this case.
>
> 3. The parties will agree on a day and time to access the defendant's computer in order to minimize the potential effect on the defendant's business.
>
> 4. After the appointed computer specialist makes a copy of the defendants hard drive, the "mirror image" will be given to defendant's counsel. Defendant's counsel will print and review any recovered documents and produce to plaintiff those communications that are responsive to any earlier request for documents and relevant to the subject matter of this litigation. All documents that are withheld on a claim of privilege will be recorded in a privilege log.
>
> 5. Defendant's counsel will be the sole custodian of and shall retain this "mirror image" disk and copies of all documents retrieved from the disk throughout the course of this litigation. To the extent that documents cannot be retrieved from defendant's computer hard drive or the documents retrieved are less than the whole of data contained on the hard drive, defense counsel shall submit a Declaration to the court together with a written report signed by the designated expert explaining the limits of retrieval achieved.[13]

This protocol has become the accepted method of providing a party with access to a another party's computer system.[14]

D. The Duty to Retain Electronic Data

A party has an obligation to retain its records where it is on notice that documents and information in its possession are relevant to litigation, or potential litigation, or are reasonably calculated to lead to the discovery of admissible evidence. While a litigant is under no duty to keep or retain every document in its possession once a complaint is filed, it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request.[15] With this in mind, a company should have a procedure in place to prevent

the deletion of potentially relevant files and e-mails under these circumstances. Failure to implement such procedures may result in sanctions by the court.

Under Rule 34 of the Federal Rules Civil Procedure, the party from whom discovery is sought has the burden of showing some sufficient reason why discovery should not be allowed, once it has been determined that the items sought are properly within the scope of Rule 26(b) [16] Merely because compliance with a document request would be costly or time-consuming is not ordinarily a sufficient reason to grant a protective order where the requested material is relevant or likely to lead to the discovery of evidence.[17] Courts are particularly sensitive to difficulties in responding to discovery requests caused by the responding party's choice of an inconvenient electronic storage system. One court took issue with a party's failure to make its electronic documents accessible:

> The defendant may not excuse itself from compliance with Rule 34 . . . by utilizing a system of record-keeping which conceals rather than discloses relevant records, or makes it unduly difficult to identify or locate them, thus rendering the production of the documents an excessively burdensome and costly expedition. To allow a defendant whose business generates massive records to frustrate discovery by creating an inadequate filing system, and then claiming undue burden, would defeat the purposes of the discovery rules.[18]

"[A] private corporation cannot avoid producing documents by an allegation of "impossibility" if it can obtain the requested information from the sources under its control."[19]

III. WHO BEARS THE COST

A. Discovery Cost Shifting Under Rule 26(b)(2)

The general practice and presumption set forth in the discovery rules is that "the responding party must bear the expense of complying with discovery requests, but may rely on the district court's discretion under Rule 26(c) to grant orders protecting him from undue burden or expense."[20]

1. The *Rowe* Cost Shifting Factors

To a large extent Rule 26(b)(2)'s proportionality test has been used as a tool to defray electronic production costs. The most influential response to this problem was set forth in *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*[21] The Court in *Rowe* utilized an eight factor test to determine whether discovery costs should be shifted from the respondent.[22] The factors are:

(1) the specificity of the discovery requests;
(2) the likelihood of discovering critical information;
(3) the availability of such information from other sources;
(4) the purposes for which the responding party maintains the requested data;
(5) the relative benefit to the parties of obtaining the information;
(6) the total cost associated with production;
(7) the relative ability of each party to control costs and its incentives to do so; and
(8) the resources available to each party.[23]

The test is ultimately an effort to determine what is fair and equitable. The factors balance the relevancy of the discovery request with the costs of retrieving the data. Application of the standard, however, has been problematic. The reason lies in the *Rowe* Court's analysis. The Court applied equal weight to each of the factors, ignoring the presumption that responding party must bear the expense of complying with discovery requests. As a result, the most significant factor ultimately is cost. The *Rowe*

Court placed a very low threshold in defining a "substantial" cost for purposes of the test. According to the *Rowe* Court, five or six thousand dollars ($5,000 - $6,000) is substantial. Such a low threshold is unreasonable when the costs associated with retrieving backup data frequently exceed six figures.[24] Thus, in nearly every case, the important factor of cost will advocate cost-shifting.

The second *Rowe* factor most likely to impact a court's decision is the "likelihood of discovering critical information." The Rowe Court reasoned that: the more likely it is that the electronic discovery contains relevant information; the fairer it is that the responding party search at its own expense. [25] The problem is that the relevance of a document is generally not known until after the documents are produced. Thus, even when the discovery request is targeted (e.g. limited to the electronic documents prepared by or sent to a specific individual) the likelihood that the produced documents are relevant is not particularly great. In effect, in very few cases will relevancy outweigh cost when mechanically applying the *Rowe* analysis.

Actual decisions have demonstrated this result. Most courts that have applied the *Rowe* factors have decided that cost shifting is appropriate.[26] However, the District Court (S.D.N.Y.) recently issued a decision in *Zubulake v. UBS Warburg, LLC*, which is likely to have far reaching implications as it re-assessed the *Rowe* test in deciding a motion to compel electronic documents.[27]

2. The *Zubulake* Cost Shifting Factors

The *Zubulake* Court focused on two considerations: (1) the types of electronic data that is burdensome to retrieve for production; and (2) modifying the cost shifting analysis to assure neutrality.[28]

The focus of the first consideration is accessibility. The necessary "undue burden and expense" showing that is required for cost shifting can only exist when electronic discovery is not accessible. The Court determined that in the world of electronic data storage "inaccessible" means sequential access backup tapes (storage devices that require reading all preceding blocks of data prior to retrieving the data that follows) and erased, fragmented or damaged data.[29] Other types of electronic storage devices do not require the same level of effort to access the data and, therefore, do not justify cost-shifting. The full cost of producing electronic files stored in these other devices remains with the respondent.

When the electronic discovery in dispute is "inaccessible" (backup tapes) then a modified version of the *Rowe* test applies. The *Zubulake* Court found that the original *Rowe* test was deficient in several areas – each undermining the presumption that the responding party pays for the collection of discovery.[30] First, the *Rowe* test failed to consider all of the factors set forth in Rule 26. In particular, it did not consider the amount in controversy or the importance of the issues at stake as required by the Rule.[31] Second, two of the *Rowe* factors – (1) the specificity of the discovery request; and (2) the purposes for which the responding party maintains the requested data – are either redundant or irrelevant. The *Zubulake* decision reasoned that the specificity factor was not necessary as it is a function of relevance and cost – two factors that are addressed elsewhere in the *Rowe* test.[32] The Court also reasoned that the purpose for which the data is maintained was irrelevant.[33] Either the electronic data is accessible or is not accessible – the purpose for which it was stored is irrelevant.[34] Thus, the *Zubulake* decision eliminated both specificity of the request and the purpose for which the data is stored factors of the *Rowe* test.

The revised *Zubulake* cost-shifting factors are:

(1) the extent to which the request is specifically tailored to discover relevant information;
(2) the availability of such information from other sources;
(3) the total cost of production, compared to the amount in controversy;

(4) the total cost of production, compared to resource available to each party;
(5) the relative ability of each party to control costs and its incentive to do so;
(6) the importance of the issues at stake in litigation; and
(7) the relative benefits to the parties of obtaining the information.[35]

The *Zubulake* revisions also modify the cost factors. The reason is that the electronic production costs are almost always a large dollar amount (as discussed above) and, when considered in a vacuum, can easily shift the production costs to the party requesting discovery.[36] The *Zubulake* factors address this concern by balancing the cost of production with the amount in controversy and the resources of the parties.[37] The intent is to lessen the emotional impact of high electronic discovery costs. High costs may not seem so unreasonable when the amount in controversy is multi-million dollars and the party producing the electronic documents is a large corporation with millions in assets.

3. The *Zubulake* Cost Shifting Analysis

Conventional wisdom warns that "[w]henever a court applies a multi-factor test, there is a temptation to treat the factors as a check-list, resolving the issue in favor of whichever column has the most checks."[38] To avoid injustices that occur when all factors a treated equally, the *Zubulake* decision sets forth a reasoned analysis to assure the focus remains on "how important the sought after evidence is in comparison to the cost of production."[39]

The revised analytical approach organizes the seven factors into four categories. First, the greatest weight is given to the first two factors: (1) the extent to which the request is specifically tailored to discover relevant information and (2) the availability from other sources.[40] These two factors comprise the "marginal utility test" which was best described in *McPeek v. Ashcroft*:[41]

> The more likely it is that the backup tape contains information that is relevant to a claim or defense, the fairer it is that the responding party search at its own expense. The less likely it is, the more unjust it would be to make the responding party search at its own expense.[42]

Second, significant weight is given to cost. The factors that comprise this category for consideration are: (3) the total cost of production compared to the amount in controversy, (4) the total cost of production compared to the resources available to each party, and (5) the relative ability of each party to control costs and its incentive to do so.[43] The final two factors stand alone in the analysis as the third and fourth categories. Factor (6), the importance of the litigation, is only considered if public policy is involved in the litigation. This is rare, but, when it is implicated, it is likely to be the deciding interest. Finally, Factor (7), the relative benefits of production as between the requesting and producing parties, is the least important as the interest is generally presumed to be in favor of the requesting party.[44]

4. The *Zubulake's* Factual Basis Requirement

In most cases, the *Zubulake* analysis will lead to a balance between the discovery's relevancy and the cost of the production. The practical problem which arises is that the relevancy of the electronic discovery request remains largely unknown until after the electronic files are recovered. The uncertainty surrounding the relevancy of the electronic discovery has caused most courts to discount the likelihood that relevant evidence will be produced to such an extent that the cost factor predominates and cost-shifting of the discovery retrieval costs is implemented.[45]

The *Zubulake* decision adopts the solution found of *McPeek* court.[46] A representative sample is produced from the requested electronic discovery – the sample costs to be borne by the respondent.[47]

Once produced, the court will use the sample representation to measure the relevancy of the discovery request and the forecasted production retrieval costs as determined from the actual costs of production sample.[48]

B. Sanctions for the Destruction of Electronic Data

As stated above, parties to litigation must maintain and produce discovery documents once it is reasonably understood that the discovery is relevant to litigation. The courts possess inherent power to sanction parties who destroy documents and information relevant to litigation. [49] The exact issue was recently addressed by the District Court (Minnesota) in a suit arising from violation of a non-compete agreement. The District Court found that a former Lexis-Nexis employee who deleted electronic files obtained from his former employer during his tenure destroyed discoverable evidence and, accordingly, was subject to sanctions.[50] The District Court held that "sanctions are appropriate when a party (1) destroys (2) discoverable material (3) which the party knew or should have known (4) was relevant to pending, imminent, or reasonably foreseeable litigation."[51]

The duty is clear and should not be taken lightly. The courts powers permit a host of prejudicial sanctions including: (1) dismissal of the case, (2) the exclusion of evidence, or (3) jury instruction on the "spoliation inference" whereby the jury is permitted to infer from the destruction of the evidence that it was destroyed because it was unfavorable.[52] Simply stated – bad faith will be punished.

IV. DEVELOPING AND IMPLEMENTING AN EFFICIENT AND COST EFFECTIVE ELECTRONIC DATA RETENTION POLICY

The failure to devise, implement and maintain an effective document retention policy that includes managing electronic data may prove to be a costly oversight. An effective retention system will enable a company to fulfill its legal obligation to retain data and documents relevant to potential litigation and to cost effectively access that information in the event of a dispute.

The importance of electronic documentation in any industry cannot be overstated. The volume of electronic documentation far exceeds written records. Researchers at the University of California at Berkeley reported in a 1999 study that 93% of all documents are generated and stored electronically with only 7% being generated and stored by non-electronic means.[53] "[N]early all conventional documents originate as computer files … E-mail traffic exceeded telephone calls and postal use a few years ago, with more than 3.5 billion messages exchanged daily in the U.S. alone … Millions of transaction[s] with legal significance take place using computer-generated communications, such as e-mail, the Web, and file exchanges."[54] The extensive use of electronic data creates storage and retrieval issues that a company must consider to increase efficiency and reduce costs during litigation.

A. The Solution: Your Existing Document Retention Program

The easiest solution is to address electronic communications in the same manner as you would any formal communication. Most companies already have document retention policies that address many of the same issues. The same common sense rules apply to electronic documentation as well.

1. Employee Training

A company's document retention policy is worthless if the employees do not know the policy and appreciate the importance of compliance. Any policy must emphasize the appropriate use of electronic communications to limit the sheer number of e-mails created within a company. Guidelines should be set in place as to how electronic documents should be generated, appropriate subject matter and recipients. E-mail should be limited to company communications only.

2. Categorize Electronic Data

Companies should store documents according to existing categories such as financial, contract information, correspondence, or for historical purposes. Any categorization of electronic data should follow guidelines implemented for paper files, including classification by project.

Many companies store e-mail and other electronic records in a general database without an organizational system that would facilitate retrieval. Problems typically arise because e-mails are stored by user instead of by subject matter. User or other focused searches are impossible in such systems and the expense of electronic discovery dramatically increases because volumes of superfluous information must be sorted through to find a few relevant documents. Procedures that store e-mail and other electronic data in subject matter classified "electronic" file cabinets make retrieval faster, easier and cheaper.

The overall benefits of organizing electronic documents are:

a. Control volume and type of information available for discovery if there is a dispute;
b. Create mechanism (electronic file cabinet) for easier retrieval at a later date;
c. Demonstrate a "good faith effort" to preserve necessary evidence; and
d. The savings in cost.

Undoubtedly, any company wishing to implement an effective electronic data retention policy must make substantial initial investments creating the infrastructure necessary to make it effective. Software, employee training, systems supervision and auditing are the immediate steps necessary to long term savings that could potentially amount to hundreds of thousands of dollars.

3. Privileged Communications

Protecting privileged electronic communications or electronically communicated proprietary company information poses similar problems with similar solutions. Proper coding and organization of these files will increase the effectiveness and efficiency of any privileged communications from an electronic document production.

One must also be aware that inadvertent disclosures of privileged electronic communications may result in a waiver of the privilege. For example, waiver by inadvertence was found where the procedures used to maintain confidentiality were deemed "lax, careless, inadequate, or indifferent to consequences" [55] It is far too easy to inadvertently send a confidential communication to unintended recipients. To reduce this risk, you should permit only those who absolutely need the information to receive electronic copies of privileged communications. The smaller the group privy to privileged communication the less likely an inappropriate distribution of privileged information will occur.

4. Deleting Drafts

An effective retention policy is intended to preserve the records necessary for the company's business purposes, similar to paper records. If it is not company policy to retain drafts, there is no reason that electronic drafts should be saved. Retaining these records is not only a waste of storage space, but may create confusion over which record was transmitted as the draft official record. Accordingly, a retention policy can and should address how to treat prior drafts.

5. Enforcement

Another important aspect of a retention policy is to make sure a written audit policy is in place and that it is consistently enforced to ensure that employees properly follow retention procedures.

6. Limited Use of Backup Tapes

Any electronic data retention policy should have a backup system in place whose purpose is to protect against the possibility of a system crash, not to save all documentation until the end of time. The policy should require that backup tapes be retained for short periods of time (e.g., a week or a month). The backup tapes should then be deleted when new backup tapes are created. Backup tapes are not intended for long-term document storage.

B. Available Technology

There is a broad range of systems available to implement a retention policy for electronic data. A company can purchase a document management system that will automatically set up electronic filing systems. In purchasing such a system, the company should verify that the system organizes e-mail as well as all other electronic records. For example, document management programs are available that automatically organize electronic files into digital file cabinets. Document Management systems, such as those provided by iManage©, prompt a user for filing categorization such that all documents created can be retrieved by the classifications assigned to them by file type, date, author and a variety of topics that can be programmed to be coded before a document is created. These systems are also adding e-mail files such that all electronic files are organized by user defined topics for easier retrieval. A less sophisticated option requires manual set up of an organizational structure for electronic records. For example, users would set up file folders in the computer systems directory and manually move electronic files to these folders. E-mail systems such as Microsoft Outlook© also have features where electronic folders can be created and to permit manual sorting of files by subject matter.

As part of the policy in archiving electronic records, a company must make sure a mechanism remains available to restore the records in the future if such systems become obsolete. Retrieving data from obsolete software presents a significant added expense.

Once a company decides to archive and maintain certain electronic data for potential litigation, it must properly dispose of all other information correctly. Using forensic computer technology, "deleted" files can be retrieved from hard drives or even overwritten back-up tapes. While such measures are costly and there is limited risk that such materials would be discoverable, it is an inexpensive procedure to sweep systems to make sure items actually become deleted.

C. System Flexibility

A retention system should be adaptable once a project becomes the subject of a dispute. Procedures need to be in place to avoid destruction of pertinent information that might otherwise have been destroyed in the normal course of business. The procedures should include the issuance of a notice of a moratorium on the destruction of any information to avoid any issue of spoliation. General practical guidelines are to treat and save your electronic files as you would paper. Doing so creates the showing of "good faith" if your record-keeping practices are questioned. The consequences of failing to follow such procedures may include increased share of the cost of document recovery or possible restrictions on claims.

VI. CONCLUSION

As the technology available to business evolves to expand our capabilities and courts expand the obligations of a party to make information available to its adversaries, business must be proactive in developing and implementing procedures to insure the proper management of this technology by its

employees. The use of best practices in the treatment of electronic business records does not require the use of the "latest technology." Instead, it is the use of the most effective and economical technology for your business needs.

END NOTES

[1] *Swierkiewicz v. Sorema, N.A.,* 534 U.S. 506, 512 (2002)(Simplified notice pleading relies on liberal discovery rules to define disputed facts and to dispose of unmeritorious claims).
[2] *Anti-Monopoly, Inc. v. Hasbro, Inc.*, No. 94 Civ. 2120, 1995 U.S. Dist. Lexis 16355, at *2-*3 (S.D.N.Y., November 3, 1995).
[3] *See Brand Name Prescription Drugs Antitrust Litigation* 1995 U.S. Dist. Lexis 8281, No. 94 Civ. 897, MDL 997 (N.D. Ill. June 15, 1995).
[4] *Id.* at 636 (emphasis inoriginal)
[5] *Anti-Monopoly, Inc. v. Hasbro, Inc.*, No. 94 Civ. 2120, 1995 U.S. Dist. Lexis 16355, at * 1 (S.D.N.Y., November 3, 1995).
[6] *Id.* (ordering cost-shifting "because the requested discovery material does not currently exist [the requesting party] is directed to pay all reasonable and necessary costs that may be associated with the manufacture of the computer-readable tape.")
[7] *See e.g. Playboy Enterprises Inc. v. Welles*, 60 F.Supp. 2d. 1050 (S.D. Cal. 1999).
[8] *Id.* at 1051
[9] *Id* at 1053
[10] *Id*
[11] *Id.* at 1054.
[12] *Id.* at 1054.
[13] *Id.* at 1054-55
[14] *See Simon Property Group LP v. my Simon, Inc.*, 194 F.R.D. 639, 641-42 (D.Ind. 2000) (granting request for inspection of all computers, computer servers and electronic recording devices in the possession, custody or control of certain employees regardless of their location, i.e. whether at home or at work).
[15] National *Ass'n of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 556-57 (N.D. Cal. 1987).
[16] Fed. R. Civ. P. 34(b)
[17] National *Ass'n of Radiation Survivors v. Turnage*, at 543, 556-57.
[18] *Kozlowski v. Sears, Roebuck & Co.*, 73 F.R.D. 73, 76 (D.Mass. 1976) (citing *Luey v. Sterling Drug, Inc.*, 240 F.Supp. 632, 634-635 (W.D.Mich. 1965).
[19] *Id.* (*citing In re: Ruppert*, 309 F.2d 97 (6 Cir. 1962); *Bingle v. Liggett Drug Co.*, 11 .R.D. 593, 594 (D.C. Mass. 1951); and *George Hantscho Co. v. Miehle-Goss-Dexter, Inc.*, 33 F.R.D. 332 (S.D.N.Y. 1963)).
[20] *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978). Under Rule 26(c) the court has discretionary power to restrict discovery by ma
cope shall be limited to certain matters, that only specified persons shall be present, that depositions shall be sealed subject only to be opened by an order of the court, that trade secrets shall not be revealed or revealed only in a certain way, and that the parties simultaneously file specified sealed documents that will only be opened by the court. These discretionary powers may be exercised upon a showing that the movant has attempted to settle his or her discovery disputes in good faith and, as a result of his or her failure to settle such dispute, justice requires the court to intervene to protect the party from embarrassment, annoyance, oppression, or undue burden or expense. FED. R. CIV. P. 26(c).
[21] 205 F.R.D. 421, 429 (S.D.N.Y. 2002).
[22] *Id.* at 429.
[23] *Id.*
[24] *See Linnen, et al. v. A.H. Robins Company, Inc. et al.*, 1999 WL 462015 (Mass.Super.) at *4 ($300,000 - $350,000 to retrieve data from one set of backup tapes).
[25] *Rowe Entertainment,* 205 F.R.D. at 430 (internal quotations and citations omitted).
[26] *Murphy Oil USA, Inc. v. Fluor Daniel, Inc*, No. Civ. A. 99-3564, 2002 WL 246439, at *3 (E.D. La. Feb. 19, 2002); *In re Bristol-Myers Squibb Sec. Litig*., 205 F.R.D. 437, 443 (D.N.J. 2002); *Byers v. Illinois State Police*, No. 99 C. 8105, 2002 WL 1264004 (N.D. Ill. June 3, 2002).
[27] *Zabulake v. UBS Warburg, LLC*, No. 02 Civ. 1243, 2003 LEXIS 7939 (S.D.N.Y. May 13, 2003) (hereinafter "*Zabulake I"*); *Zabulake v. UBS Warburg, LLC ("Zabulake II"*), No. 02 Civ. 1243, 2003 LEXIS 12643 (S.D.N.Y. July 24, 2003) (hereinafter *Zabulake II*).
[28] *Zabulake I*, 2003 LEXIS 7939, at *30, *37.
[29] *Id.* at *30.

[30] *Id.* at *37.
[31] *Id.*
[32] *Id.* at *40.
[33] *Id.*
[34] *Id.*
[35] *Id*. at *43.
[36] *Id.* at *38.
[37] *Id*. at *38, *39.
[38] *Id.* at *43, *citing, Big O Tires, Inc. v. Bigfoot 4X4*, 167 F. Supp. 2d 1216, 1227 (D. Colo. 2001).
[39] *Id*. at *43.
[40] *Id*. at * 44.
[41] 202 F.R.D. 31 (D.D.C. 2001).
[42] *Id*. at 34.
[43] *Id.* at *45.
[44] *Id.* at *46.
[45] *e.g. Rowe*, 205 F.R.D. at 430.
[46] *McPeek*, 202 F.R.D. at 34-35.
[47] *Zabulake I*, 2003 LEXIS 7939, at *48.
[48] *Id*. at *48, *49.
[49] *Lexis-Nexis v. Beer,* 41 F.Supp. 2d. 950, 954 (D.Minn. 1999) (internal quotations and citations omitted).
[50] *Id.*
[51] *Id.* (citing Jamie S. Gorelick et al, Destruction of Evidence § 3.8, at 88 (1989).
[52] *See Linnen v. A.H. Robins Co., Inc.,* No. 97-2307, 1999 WL 462015, 10 Mass L. Rptr. 189 (Mass. Super. June 16, 1999) at *11 (citing Kippenham v. Chauk Services, Inc., 428 Mass. 124, 127, 697 N.E. 2d 527 (1998).
[53] *See* Ken Withers, *Electronic Discovery*, National Workshop for United States Magistrate Judges (June 12, 2002).
[54] *Id.*
[55] *See Eigenheim Bank v. Halpern,* 598 F. Supp. 988, 991 (S.D.N.Y. 1984)